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NO. 93-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LAWLINE, *et al.*,

Petitioners

v.

AMERICAN BAR ASSOCIATION, *et al.*,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT THE CHICAGO BAR ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the corrected Petition was "promptly substituted" as required by Supreme Court Rule 33.7 after the original Petition was rejected for formal defects.

B. Whether the Petition should be denied for mootness because the disciplinary charges brought against petitioners were dismissed.

C. Whether the Court of Appeals ruled consistently with this Court's decisions in holding that the CBA's alleged conduct is immune from antitrust liability under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

D. Whether the Petition fails to raise issues warranting review by this Court because petitioners' antitrust claims are barred by the Clayton Act's four-year statute of limitations.

E. Whether the Court of Appeals ruled consistently with this Court's decisions in holding that the constitutional claims against the CBA fail to allege state action under *N.C.A.A. v. Tarkanian*, 488 U.S. 179 (1988).

LIST OF PARTIES

The parties to the proceedings below were:

The petitioners:

Lawline, an unincorporated association of lawyers, paralegals and laypersons;

Thomas Holstein;

LeNore Nelson;

Joyce Novak;

The respondents:

The Justices of the Supreme Court of Illinois;

The members of its Committee on Professional Responsibility;

The members of its Attorney Registration and Disciplinary Commission ("ARDC");

The United States Trustee for the Northern District of Illinois;

The United States Trustee's Assistant;

Five members of the executive committee of the District Court for the Northern District of Illinois;

The American Bar Association ("ABA");

The Illinois State Bar Association ("ISBA"); and

The Chicago Bar Association ("CBA").

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STATEMENT OF THE CASE AND FACTS

The petitioners are Lawline, Thomas Holstein, LeNore Nelson and Joyce Novak. Lawline is an association of lawyers and laypersons. (Complaint, Count I, ¶2.)[1] Holstein is a licensed attorney who serves as the managing director of Lawline. (Complaint, Count I, ¶1.) Nelson is the head paralegal and office manager of Lawline. (Complaint, Count I, ¶3.) Novak received information concerning a Chapter 7 bankruptcy from Petitioner Nelson. (Complaint, ¶¶1-4.)

Petitioners filed their complaint on August 19, 1988 and an amended complaint on December 9, 1988, naming as defendants

[1]All citations to the "complaint" are to the First Amended Complaint filed on December 9, 1988.

numerous federal and state officials responsible for issuing and enforcing the rules governing attorney conduct before the United States District Court for the Northern District of Illinois (the "Northern District") and the Illinois courts. They include all Justices of the Supreme Court of Illinois, members of its Attorney Registration and Disciplinary Commission and the members of the Executive Committee of the Northern District. Also named as defendants are the American Bar Association ("ABA"), the Illinois State Bar Association ("ISBA"), the Chicago Bar Association ("CBA"), the United States Trustee for the Northern District and his assistant.

Petitioners' allegations against the CBA center on the CBA's supposed participation in the drafting and promulgation of the ABA Model Code of Professional Responsibility (the "ABA Model Code") and the ABA Model Rules of Professional Conduct (the "ABA Model Rules").

A. The Courts' Adoption of the ABA Model Code and Rules.

The ABA Model Code, first published in 1969, prohibits the practice of law by associations of lawyers and laypersons. ABA Model Code, Canon 3, Disciplinary Rules 3-101, 3-103. In 1980, the Illinois Supreme Court, using the ABA Model Code as its blueprint, enacted the Illinois Code of Professional Responsibility (the "Illinois Code") to govern the professional conduct of attorneys practicing in Illinois. Ill.Rev.Stat. ch. 110A, Art. VIII. The Illinois Supreme Court, through its Attorney Registration and Disciplinary Commission ("ARDC"), was solely responsible for enforcement of the Illinois Code. Ill.Rev.Stat. ch. 110A, Rules 751-754.

Canon 3 and Rules 3-101 and 3-103 of the Illinois Code, which were identical to their ABA Code counterparts, provided:

CANON 3

A Lawyer Should Assist In Preventing
The Unauthorized Practice Of Law

Rule 3-101. Aiding Unauthorized Practice of Law

(a) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

* * *

Rule 3-103. Forming a Partnership with a Nonlawyer

A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

The Local Rules of the Northern District incorporate the ABA Model Code provisions and also prohibit the practice of law by associations of lawyers and laypersons. General Rule 3.54. Under General Rule 3.51, the District Court's Executive Committee has exclusive responsibility for enforcing General Rule 3.54.[2]

In 1983, the ABA promulgated the ABA Model Rules which were essentially the same as the Model Code and Illinois Code. Before adopting the Model Rules, the ABA House of Delegates considered and rejected a proposed rule that would have permitted associations of lawyers and nonlawyers to practice law. (Complaint, Count I, ¶¶ 75-80.) Consequently, the ABA Model Rules continue to prohibit the practice of law by such entities. Rule 5.4(b) states:

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[2]Petitioners also challenge "Rule 3-101(a) and 3-103(a) of the newly proposed Illinois Code." (Complaint, Count I, ¶19.) On February 8, 1990 the Illinois Supreme Court replaced the Code of Professional Responsibility with the Illinois Rules of Professional Conduct, Ill.Rev.Stat. ch. 110A, Rules 1.1, *et seq.*, which took effect August 1, 1990, after the District Court's order dismissing the complaint. As the District Court noted, the provisions of the new Illinois Rules relating to professional independence and the unauthorized practice of law are the same in substance as those in the ABA Model Code and the old Illinois Code. *See* new Illinois Rule 5.4(b) ("A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.") and the new Illinois Rule 5.5 ("A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."), as set forth in the Petition at p. 44b.

> [a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Similarly, Rule 5.5(b) states that:

> [a] lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. (See petition, p. 43b).

Petitioners allege that a joint committee of the CBA and ISBA prepared suggested revisions to the Illinois Code in light of the ABA Model Rules. (Complaint, Count I, ¶144.) The proposed revisions, however, left unchanged the existing Illinois Code provisions concerning the ability of lawyers and nonlawyers to form an association for the purpose of practicing law. (Complaint, Count I, ¶152.) Accordingly, by 1982, the state of the law was that both the Illinois Supreme Court and the Northern District had adopted provisions prohibiting the practice of law by associations of lawyers that were essentially identical to the ABA's 1983 model provisions.

B. Petitioners' Allegations Against the CBA.

Petitioners contend that these ABA Model Code and Model Rules provisions are the product of a conspiracy among the bar associations to exclude associations of lawyers and laypersons from the practice of law. (Complaint, Count I, ¶¶205-210.) They allege that the CBA is a party to this conspiracy because, although it took no action, some of its members also belong to the ABA or ISBA. (Complaint, Count I, ¶9.) They further allege that two delegates representing the CBA in the ABA House of Delegates voted against the proposed rule that would have permitted associations of lawyers and laypersons to practice law under the ABA Model Rules. (Complaint, Count I, ¶¶89, 90.)

Petitioners also claim that, in furtherance of this alleged conspiracy, the CBA issued two ethics opinions concerning the un-

authorized practice of law, one in 1971, the other in 1977. They contend that the CBA enforces these ethics opinions with threats of governmental disciplinary proceedings and "peer pressure." (Complaint, Count I, ¶¶178, 220, 249.)

Petitioners also assert that in 1988 the United States Trustee and his assistant reported to the ARDC that nonlawyers at Lawline were giving legal advice in bankruptcy proceedings, and later filed a motion in a bankruptcy proceeding to enjoin Lawline from engaging in the practice of law in those proceedings (Petition pp. 1, 30a, 31a). These charges were dismissed after petitioners filed their lawsuit and before the District Court's decision (Petition p. 1).

Based on these allegations, petitioners assert antitrust and constitutional claims against the CBA. Their principal antitrust claim is that the CBA has combined and conspired with the other bar associations to exclude entities such as Lawline from the practice of law. (Complaint, Count I, ¶209.) Petitioners allege as well that the bar associations have engaged in a group boycott of entities such as Lawline. (Complaint, Count I, ¶111.) As for their constitutional claims, petitioners allege that the CBA has deprived them of constitutional rights, in violation of Section 1983 of the Civil Rights Act of 1871, as amended. Specifically, they contend that the Illinois Code, the ABA Model Code and the ABA Model Rules deprive them of their First Amendment rights of freedom of speech and association. (Complaint, Count II, ¶¶18, 19.)

The CBA's motion to dismiss for failure to state a claim was granted by the United States District Court for the Northern District on May 24, 1990, as were those of the other defendants. Petitioners filed a timely notice of appeal on July 20, 1990.

On February 25, 1992, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's dismissal. The

Seventh Circuit ruled that the CBA's conduct was immune from antitrust liability because the source of the challenged restraints was valid governmental action (the adoption by the state and district courts of the Illinois Code and Northern District Rules, respectively) rather than the CBA's or other bar association conduct. The court dismissed petitioners' constitutional claims against the CBA for failure to allege state action. (Petition, pp. 33a-36a).[3] The Seventh Circuit also noted that petitioners were never sanctioned by either the Illinois Supreme Court or the Northern District and that respondents stipulated at oral argument that petitioners' conduct was not prohibited by the ethics rules at issue (Petition, p. 31a, n.2). Consequently, the Seventh Circuit found that any argument concerning the application of the rules to petitioners' conduct was not before the court (*id.*).

On May 26, 1992, Petitioners filed their original Petition for a Writ of Certiorari. However, the original Petition was rejected because of various formal defects. Petitioners did not file their corrected Petition until October 1, 1993, more than 16 months after the original due date.

SUMMARY OF ARGUMENT

The Petition should be denied because it is untimely, the case is moot and the courts below did not misapply any controlling legal standard of this Court.

Although as required by Rule 13.1, the original Petition was filed within 90 days after the Seventh Circuit's judgment, the current Petition is untimely because it was rejected for various defects in form and the corrected Petition was not "promptly substituted" as required by Supreme Court Rule 33.7. Instead, it was not filed until 16 months after the original due date.

[3]Although the District Court also had ruled that petitioners' antitrust claims were time-barred, the Seventh Circuit did not expressly address this issue.

The case is moot because the disciplinary charges brought against petitioners prompting their lawsuit were dismissed before the District Court's May 24, 1990 decision and no sanctions were ever imposed on petitioners by any court. Therefore, they have suffered no injury that can be redressed and no case or controversy exists.

The Seventh Circuit's rulings regarding the CBA not only do not conflict with any decision of this Court but are entirely consistent with them. Under the *Noerr* case, the CBA is immune from antitrust liability for any alleged actions relating to the publication of model standards of attorney conduct, lobbying for their adoption and issuing ethics opinions because the Illinois Supreme Court and the Northern District enacted those same standards into law and have sole authority and responsibility for enforcing those laws. Allegations of a boycott or conspiracy fail to defeat this immunity and no law is cited by petitioners to show otherwise. Independently, the complaint allegations, even if proved, would be insufficient to show that the alleged "conspiracy" had any anticompetitive effects.

Petitioners' antitrust claims also are barred by the applicable four-year statute of limitations. Their complaint does not allege any anticompetitive act by the CBA within the four-year period. This defect is not cured by petitioners' assertion that the CBA is part of an ongoing conspiracy because petitioners have not alleged any overt act by the CBA in furtherance of the conspiracy within the limitations period. This Court's "continuing violation" rule requires more than petitioners' allegation of a continuing injury from a pre-limitations act.

With respect to petitioners' constitutional claims, the Seventh Circuit's ruling that the CBA's alleged activities did not amount to state action was correct under this Court's ruling in *N.C.A.A.*

v. Tarkanian, because the Illinois Supreme Court retained final authority to accept or reject the model standards.[4]

ARGUMENT

A. The Petition Should Be Rejected As Untimely

Petitioners submitted their original Petition for Writ of Certiorari on May 26, 1992, within 90 days of the Seventh Circuit's February 25, 1992 judgment. However, the original petition was rejected because of various defects, including its failure to comply with the form requirements of Supreme Court Rule 33.

Petitioners did not then file their current Petition until October 1, 1993, more than 16 months after the original due date. Under Supreme Court Rule 33.7 a petition rejected for formal defects may be deemed untimely if new and proper copies are not "promptly substituted." That rule further provides that the Court may impose appropriate sanctions for noncompliance, including but not limited to dismissal of the action. The passage of 16 months is hardly "prompt." It is the antithesis—dilatory and incurable. In light of petitioner's extraordinary delay, dismissal of the action is appropriate for this reason alone.

B. The Petition Should Be Denied Because The Case Is Moot.

There ceased to be a live case or controversy here when the disciplinary proceedings against petitioners were dismissed. Then

[4]The same arguments have equal force with respect to the CBA's alleged participation with the Illinois Supreme Court's Committee on Professional Responsibility in drafting the 1990 Illinois Rules before they were presented to the Illinois Supreme Court. The Committee did not make the decision. And in any event, any activity relating to the new Illinois Rules is irrelevant because those rules were not adopted until 1990, after petitioners' lawsuit was filed, and were identical in all relevant respects to the 1980 Illinois Code. Therefore, the new Rules could not have caused petitioners the injury they complain of and have no bearing on this case.

threatened action by the United States Trustee for the Northern District and his assistant and potential sanction by the ARDC disappeared. All charges brought against petitioners both in the bankruptcy court and before the ARDC were gone (Petition p. 9). Petitioners were not sanctioned by either the Illinois Supreme Court or the Northern District and respondents agreed in oral argument before the Court of Appeals that petitioners' conduct does not violate the ethics rules at issue (Petition p. 31a, n.2). Consequently, there is no "case or controversy" between the parties and the petition is moot.

To satisfy the constitutional case-or-controversy requirement, this Court has consistently held that a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. *See Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70 (1983). This requirement exists at every stage of the proceedings, including the appellate stages. *See Steffel v. Thompson*, 415 U.S. 452, 459, n. 10 (1974).

Here, petitioners were never injured. All disciplinary charges were dismissed and petitioners were never sanctioned. As a result, they suffered no "actual injury" that can be redressed in court. Therefore, petitioners no longer have a "personal" stake in this litigation. *See United States Parole Comm. v. Geraghty*, 445 U.S. 388, 396-397 (1980), *citing*, *Flast v. Cohen*, 392 U.S. 83, 100-101 (1968).

Because "the issues presented are no longer 'live' [and] the parties lack a legally cognizable interest in the outcome," the case is moot. *United States Parole Comm.*, 445 U.S. at 396, *quoting*, *Powell v. McCormack*, 395 U.S. 486 (1969). Petitioners offer no legal or factual support for their contrary argument (Petition p. 9).

Even if petitioners were to argue that an exception exists because the case is "capable of repetition, yet evading review," that possibility is theoretical at best and that is not enough to avoid

the effect of mootness. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982). To come within the exception, there must be a " 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.' " *Id. citing Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). No facts justify that conclusion here. To the contrary, during oral argument before the Seventh Circuit, respondents stipulated that petitioners' conduct was not prohibited by the ethics rules at issue. In light of this stipulation, made in open court, there can be no reasonable expectation that respondents will ever take action causing the same controversy to arise again. Accordingly, the petition should be denied for mootness if not otherwise denied.

C. The Seventh Circuit's Rulings Relating To The CBA Are Consistent With Applicable Decisions Of This Court.

1. The Seventh Circuit Correctly Ruled That The CBA's Alleged Conduct Is Exempt From Antitrust Liability Under This Court's Holding In Noerr.

The Seventh Circuit held that the CBA was immune from federal antitrust liability under the principles articulated by this Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (Petition, p. 33a). In *Noerr*, this Court held that "[w]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136. Because the enforceable source of the alleged restraints on petitioners' practice of law here was the Illinois Code and Northern District Rules rather than the private action by the CBA or other bar associations, the CBA's alleged conduct, if true, is immune from federal antitrust liability (Petition, p. 33a).[5]

[5]Although the Seventh Circuit did not expressly so rule, petitioners' antitrust allegations against the CBA are independently time-barred because the most recent act alleged of the CBA occurred more than four years before the complaint was filed. The Sherman Act's statute of limitations is therefore an alternate basis to deny the petition.

a. The ABA Code And Model Rules Do Not Restrain Trade Of Their Own Force.

This Court's ruling in *Noerr* provides that restraints on competition that are the result of valid government action, rather than private action, cannot violate the Sherman Act. *Noerr*, 365 U.S. at 135-36. Further, restraints resulting from efforts to influence government action do not give rise to antitrust liability, even if those efforts are concerted and anticompetitively motivated. *Allied Tube & Conduit Corp. v. Indian Head Inc.*, 486 U.S. 492, 499 (1988) The scope of *Noerr* immunity depends on the source of the challenged restraint. Where, as here, government action causes the restraint, then lobbying itself is protected because "those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Allied Tube*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136). Anticompetitive private action that does not restrain competition "of its own force" retains its *Noerr* immunity from antitrust scrutiny. *Allied Tube*, 486 U.S. at 510.

As the District Court aptly noted, "[i]t is undisputed that if plaintiffs are restrained from practicing law, it is because of the Illinois Supreme Court's enactment of the Illinois Code of Professional Responsibility and the District Court's adoption of General Rule 3.54." *Lawline v. American Bar Ass'n,* 738 F. Supp. 288, 292 (N.D. Ill. 1990), *aff'd,* 956 F.2d 1378 (7th Cir. 1992). Once the Illinois Code of Professional Conduct became law in 1980, governmental agencies became responsible for enforcement of those rules, and it was those agencies and the Illinois law, not the Model Code or Model Rules, that restricted petitioners' conduct. Petitioners acknowledge as much in their complaint, stating:

> The professional conduct of members of the Illinois bar is governed by the Illinois Code of Professional Responsibility, Ill. Rev. Stat. ch. 110A, Art. VIII. Rule 3-103 prohibits lawyers from forming partnerships with non-lawyers if any

> of the activities of the partnership consists of the practice of law. . . . These prescriptions and proscriptions of the Code are administered in general by the defendant members of the ARDC which is constituted by the Supreme Court of Illinois under the Rules of the Supreme Court.

(Complaint, Count I, ¶¶39-40.)

Indeed, petitioners never allege that the model standards had any effect on them before they were adopted as law by the judiciary. On the contrary, they allege that those standards were in effect at the time they organized Lawline, and that they operated undisturbed notwithstanding those standards until they were reported to the ARDC (see Complaint, Count I, ¶¶29, 39, 190-92, 195; Count III, ¶¶176-80). The ARDC, of course, enforced the Illinois Code, not the model standards.

Consequently, petitioners' argument that the model standards restrain competition "of their own force" is unsupported by the law or the factual allegations of their own complaint.

Petitioners argue erroneously that the *Noerr* exemption does not apply to the bar associations' efforts in promoting the Model Rules because those efforts constitute a "boycott" conducted by business competitors (Petition, p. 10). Their argument, however, was expressly rejected in petitioners' cited authority, *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411 (1990) (Petition p. 10). There, the Court held that a boycott by a group of private attorneys who acted as court-appointed counsel in criminal cases in the District of Columbia violated the antitrust laws even though the boycott was aimed at forcing the District to increase their compensation for that work. The Court ruled that the *Noerr* defense did not apply simply because the group's objective was the enactment of favorable legislation. In so holding, the Court specifically distinguished situations like the one at hand where the alleged restraint on trade was

the consequence rather than the result of governmental action. It said:

> But in the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation. . . . In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

493 U.S. at 424 (emphasis in original). Here, similarly, the alleged restraint of trade was the consequence of the State's restriction contained in the Illinois Code. Consequently, *Superior Court Trial Lawyers* does not support petitioners' argument.

Petitioners also rely on *Allied Tube* and argue that, like *Allied Tube*, this is a case "where an economically interested party exercises decisionmaking authority in formulating a product standard." (Petition p. 12.) But that similarity is not enough, because *Allied Tube* also limited antitrust liability to "the effect the standard has *of its own force* in the marketplace." *Allied Tube*, 486 U.S. at 510 (emphasis added).

In this case, the Model Code and Model Rules could not have had anticompetitive effects beyond those resulting from the adoption of the Model Code and Model Rules by the Illinois Supreme Court and the Northern District. This critical fact distinguishes this case from *Allied Tube*, where the association's code had practical consequences in the marketplace unrelated to any adoption of that code into state law. Those consequences included that "private certification laboratories, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet code standards; many underwriters will refuse to insure structures that are not built in conformity with the code; and many electrical inspectors, contractors and distributors will not use a product that falls outside the Code." 486 U.S. at 495-496. No such independent anticompetitive effects are alleged here.

Petitioners also argue that *Noerr* immunity does not apply because the CBA somehow engaged in allegedly anticompetitive acts directed toward other lawyers (Petition, p. 11). This conduct supposedly consisted of participation in the 1983 ABA House of Delegates debate over the Kutek Commission's recommendation to amend Model Rule 5.4 so that it would have allowed multi-professional partnerships and associations. However, petitioners' argument ignores the basic holding in *Noerr* which focuses on the source of the challenged restraints. The alleged anticompetitive actions of the CBA in the ABA House of Delegates occurred after the Illinois Code and Northern District Rules had already been enacted and after the Illinois Supreme Court had preempted the field of attorney regulation. Thus, even if the CBA had voted to change the Model Rules, the participants in the debates were powerless to enforce any new rule because they had no authority to change or enforce the Illinois Code. That power rested solely in the Illinois Supreme Court. Again, the source of the alleged restraint was the Code of Professional Responsibility enacted by the Illinois Supreme Court, and not anything that the CBA did in the ABA House of Delegates.

Because the CBA's actions, the Model Code and the Model Rules had no anticompetitive effects of their own force, the CBA is immune under *Noerr* and *Allied Tube*. The Seventh Circuit's ruling was consistent with those decisions.

b. The CBA's Ethics Opinions Do Not Restrain Trade Of Their Own Force.

Also meritless is petitioners' argument that the drafting and distribution of ethics opinions have no antitrust immunity because they were aimed at other lawyers and have effect through lawyer peer pressure and the ABA's "market power" (Petition pp. 15-16). As just shown, ethics opinions and peer pressure can have no independent effect greater than statutory provisions that carry the force of law. Moreover, petitioners' assertions about the

ABA's "market power" are irrelevant to this respondent, the CBA. In any event, the CBA's 1971 and 1977 ethics opinions (Complaint, Count I, ¶178(c)) were merely advisory. Nowhere is it alleged that the CBA has ever enforced its opinions by way of internal disciplinary proceedings; nor is there any allegation that lawyers are not free to disregard the CBA's opinions. Therefore, those opinions cannot restrain trade of their own force beyond the restraints imposed by law.

Although petitioners acknowledge that the Illinois Supreme Court and the District Court "exercise exclusive power to regulate and discipline attorney conduct" (Petition p. 17), they still argue incorrectly that the ABA's power is sufficient to "dictate the uniform national standard of lawyer conduct embodied in its ethics opinions" and Model Rules, which they claim are the "exclusive source for state rules" (Petition p. 16). They also argue that the federal courts "have traditionally looked to the ABA ethics opinions" as a source of ethical standards (Petition p. 17). But the cases cited by petitioners are not instructive. All involve courts' interpretations of ethical obligations *in the absence* of applicable state or federal rules preempting the field of lawyer regulation (as distinct from this case) or are otherwise irrelevant.[6]

For example, in *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 160 (3d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985), the court looked to the ABA Model Code only after specifically noting that the court itself had adopted no official standards of professional conduct. Similarly, *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 224-25 (1967), was decided before the Illinois Code was adopted; moreover, the majority opinion specifically stated that the views of the Illinois Supreme Court were more relevant in evaluating the propriety of lawyer conduct than were ABA ethics opinions. Thus, the court's opinion under-

[6]Moreover, all of petitioners' cases deal with the ABA's opinions and standards. None suggests that the CBA's ethics opinions or standards restrain trade of their own force.

mines petitioners' argument that the ABA's opinions have independent force after adoption of the Illinois Code. *See also Schniederjon v. Krupa,* 130 Ill. App. 3d 656, 474 N.E.2d 805, 809 (5th Dist. 1985) *app. denied,* 520 N.E.2d 393 (1988) (reviewing contract made before adoption of the Illinois Code); *Corti v. Fleisher,* 93 Ill. App. 3d 517, 417 N.E.2d 764, 774, n. 1 (1st Dist. 1981) (reviewing contract made before adoption of the Illinois Code, and looking to the ABA Code only after reviewing Illinois common-law precedents and finding them insufficient); *In re "Agent Orange" Product Liability Litigation,* 611 F. Supp. 1452, (D.C. N.Y. 1985), *later proceeding,* 800 F.2d 14 (2d Cir. 1988), *rev'd,* 818 F.2d 216 (2d Cir. 1987), *cert. denied,* 484 U.S. 926 (1987) (ABA Code not adopted as state law, but under consideration for adoption, thus explaining the court's reference to it).

In *Strickland v. Washington,* 466 U.S. 668, 688-89 (1984), *reh. denied,* 467 U.S. 1267 (1984), the Court did not rely on any ABA standard or rule, but made only a passing reference to the ABA Standards for Criminal Justice (not in issue here), stating that those standards are "guides" only and not determinative in deciding what level of representation is reasonable for purposes of the Sixth Amendment right to representation. Moreover, the Court there was attempting to discern a national norm; consequently, no one state's rules could be relied upon as dispositive. Thus, the case is distinguishable on several bases. Finally, in *O'Hara v. Ahlgren, Blumenfeld and Kempster,* 127 Ill.2d 333, 537 N.E.2d 730, 735-36 (1989) the only case cited by petitioners in which the court reviewed both the Illinois Code and the ABA model standards, the court looked first to the Illinois Code and decided the case on that basis, turning to ABA opinions only for guidance and additional support.

With respect to any of their cited cases or this case, petitioners cannot seriously contend that a court would apply an advisory ABA or CBA rule or opinion if such rule or opinion were in conflict with the law adopted by the Illinois Supreme Court or

federal court in question. Indeed, the Court stated explicitly in *United Mine Workers*, 389 U.S. at 224-25, that it would not follow an informal opinion of the ABA that conflicted with the stated views of the Illinois Supreme Court.

Petitioners' remaining authorities (Petition, p. 15) lend no support for their position because, unlike the government-imposed restrictions here, they all involve restraints imposed by private entities where parallel state law restrictions were not in place and the state had not preempted the field as it has done here. *See Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *on remand*, 671 F. Supp. 1465, 1470 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990), and *cert. denied*, 498 U.S. 982 (1990); *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1482-83 (D.C. Cir. 1984); *American Medical Ass'n v. F.T.C.*, 638 F.2d 443, 449-50 (2nd Cir. 1980), *aff'd*, 455 U.S. 676 (1982), *reh. denied*, 456 U.S. 966 (1982); *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298, 301, 303, (E.D. Va. 1977), *vacated*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-90, n. 19 (1975), *reh. denied*, 423 U.S. 886 (1975). In addition, none of those cases involved the *Noerr* defense.

Moreover, in *Surety Title* and *Goldfarb*, the challenged ethics opinions were issued by a state bar association to which all lawyers in the state were required by law to belong as a condition of licensure, and which the legislature had anointed as an administrative agency of the state Supreme Court for the purpose of investigating attorney violations of the Court's rules. *Goldfarb*, 421 U.S. 773, n.2, 776-78, n. 6; *Surety Title*, 431 F. Supp. at 300. That state-sanctioned authority, as the Court specifically noted in *Goldfarb*, 421 U.S. at 778, n. 6, may have engendered influence in the Virginia State Bar that is not present here. As a result, not only were the Virginia State Bar's ethics opinions the only source of authority on the issues in question there, but they were backed

by the State Bar's official authority to investigate deviations from the standards they set forth. Thus, the ethics opinions considered in those cases, unlike the CBA's opinions, had an impact on the plaintiffs "of their own force." *Surety Title* and *Goldfarb* are distinguishable for those additional reasons, and petitioners have cited no pertinent authority removing this case from the *Noerr* defense.

Furthermore, petitioners' allegations of conspiracy (Petition, p. 17) are insufficient to state an antitrust claim and add nothing to their argument. There is no conspiracy exception to the *Noerr* defense. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 399 (1991). In any event, the existence of a conspiracy could not change the fact that the ethics opinions have no effect of their own force.[7] Consequently, *Noerr* immunity applies.

c. The CBA's Alleged Conduct Had No Anticompetitive Effect.

Independently, the dismissal of the complaint was correct because petitioners have failed to allege that the CBA's conduct restrained trade or had any anticompetitive effect. It has long been the law that plaintiffs in antitrust actions must allege and prove that the defendant's conduct adversely affected competition. *See, e.g., Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819 (10th Cir. 1987) (antitrust laws designed to protect competition, not competitors); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (plaintiff must allege not only injury to itself, but injury to the market as well).

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[7]Moreover, the allegations of conduct by the CBA do not amount to a conspiracy. Petitioners label the CBA a "co-conspirator" based on allegations that some of its members belong to the ABA. However, it is beyond dispute that "[m]ere membership in associations is not enough to establish participation in a conspiracy with members of those associations, much less in a conspiracy between those associations and yet another association." *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 265 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

Petitioners have not shown how the opinions and model standards they challenge restrict competition in law practice. Petitioners are only concerned about those rules and laws that prohibit laypersons from possessing ownership interests in business entities engaged in the practice of law. In essence, they are complaining about restrictions on the organizational form in which certain of the petitioners desire to practice law; they are not complaining about any artificial restraints on the supply of lawyers, the manner in which persons practice law or the manner in which lawyers determine the fees they charge for their services. If petitioners had their way, they would substitute one organizational form of practice for another without affecting the availability of persons who can render legal advice. Without allegations of injury to a generalized market, allegations of the substitution of one form of organization for another are insufficient to allege anticompetitive effect. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414 (11th Cir. 1984) (substituting one competitor for another does not violate the antitrust laws, since there is no injury to competition); *Cf. Car Carriers, Inc.*, 745 F.2d at 1107 (generalized injury to competition necessary to state antitrust claim).

In short, none of petitioners' arguments show how the CBA's ethics opinions could restrain trade of their own force, nor how the Seventh Circuit's decision is inconsistent with any ruling of this Court. For these reasons, the Petition must be denied.

2. Independently, Petitioners' Antitrust Claims Against The CBA Are Time-Barred.

The statute of limitations for private claims brought under the Clayton Act is four years. 15 U.S.C. Sec. 15(b). This case was filed on August 19, 1988. The CBA ethics opinions about which petitioners complain (Petition p. 19) were issued in 1971 and 1977, well outside the four-year limitations period. The claims based on them are clearly time-barred.

Further, any alleged conspiracy designed to cause the adoption of the Model Code necessarily ended in 1980, when the Illinois

Code was enacted. Although petitioners argue that the alleged conspiracy against them is "ongoing and continuing" (Petition p. 19), they fail to allege any specific, overt act by the CBA in furtherance of the alleged conspiracy within the limitations period. Consequently, they cannot satisfy the continuing violation exception to the statutory time bar. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 338 (1971); *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pennsylvania,* 815 F.2d 270, 278 (3d Cir. 1987), *cert. denied,* 484 U.S. 851 (1987); *Pace Indus., Inc. v. Three Phoenix Co.,* 813 F.2d 234, 237-238 (9th Cir. 1987); *KFC Corp. v. Marion-Kay Co.,* 620 F. Supp. 1160, 1167 (S.D. Ind. 1985).

In *Zenith Radio,* this Court stated the continuing violation rule as follows:

> [E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations *runs from the commission of the act.*

401 U.S. at 338 (emphasis added). Indeed, in each of the cases cited by petitioners, the defendant had committed overt acts in furtherance of the conspiracy within the limitations period. See the cases cited above; *2361 State Corp. v. Sealy, Inc.,* 263 F. Supp. 845, 850-51 (N.D. Ill. 1967) (defendant terminated plaintiff's contract within four years of complaint filing); and *Wilk,* 671 F. Supp. at 1474-77 (complaint was filed in 1976; defendant drafted anticompetitive standard in 1973, sent out anti-chiropractic literature through the date of trial and issued an anti-chiropractic Judicial Council Opinion after complaint was filed, convincing the court that a boycott continued to exist as of that time).[8]

[8] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* (Petition, p. 19), is irrelevant because it dealt with a monopoly, not a conspiracy. Further, *Hanover* involved unusual circumstances, such as the application of various tolling provisions contained in the Clayton Act and the Wartime Tolling Act, as well as the defendant's ongoing refusals to deal with the

(footnote continued on next page)

By contrast, no such overt act by the CBA has been alleged within the limitations period. The most recent "overt act" alleged of the CBA is the promulgation and dissemination in 1977 of the position opposing the unauthorized practice of law. That date is eleven years before this lawsuit was brought and seven years outside the limitations period. No alleged injury to petitioners could have flowed from later statements of that position that did not flow from the first. Where all damages necessarily result from pre-limitations conduct, no new cause of action arises for any subsequent acts within the limitations period because those acts do not injure the petitioners. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982), *reh'g denied*, 683 F.2d 1373 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Keystone Resources, Inc. v. American Telephone and Telegraph Co.*, 646 F. Supp. 1355, 1361 (W.D. Pa. 1986), *aff'd without opinion*, 826 F.2d 1056 (3rd Cir. 1987); *Woodbridge Plastics, Inc. v. Borden, Inc.*, 473 F. Supp. 218, 221 (S.D. N.Y. 1979), *aff'd without opinion*, 614 F.2d 1293 (2nd Cir. 1979); *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) and 425 U.S. 971 (1976). There must be a new injury-causing act within the limitations period, not merely continuing injury. *See Keystone*, 646 F. Supp. at 1361; *Naxon Telesign Corp. v. Bunker Ramo Corp.*, 517 F. Supp. 804, 810 (N.D. Ill. 1981), *aff'd in part*, 686 F.2d 1258, 1267 (7th Cir. 1982). The required overt act must be new and independent (not merely a reaffirmation) *and* it must inflict a new and accumulating injury. *Pace*, 813 F.2d at 238. Petitioners allege nothing more than a continuing injury resulting from a discrete, pre-limitations act.

Moreover, petitioners specifically fail to allege any overt, anticompetitive act *by the CBA* within the four-year period before

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plaintiff and its monthly collection of rentals within the statutory period, all of which distinguish it from this case. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F. Supp. 258, 294, n. 15 (M.D. Pa. 1965), *vacated in part*, 377 F.2d 776, 794 (3rd Cir. 1963), *aff'd in part, rev'd in part*, 392 U.S. 481, 502, n. 15 (1968).

petitioners filed their complaint. Petitioners complain of an alleged 1987 ABA ethics opinion and argue that none of the private associations' ethics opinions was ever rescinded (Petition p. 19). But these assertions do not allege an overt act by the CBA within the limitations period. *See Ratino v. Medical Service of Dist. of Columbia (Blue Shield)*, 718 F.2d 1260, 1272 (4th Cir. 1983) (dismissing one defendant because the only actions by that defendant were well before the four-year limitations period).

Further, although petitioners assert that the New (1990) Illinois Code was drafted between 1983 and 1987 by a joint committee which included the CBA and ISBA (Petition p. 20), the provisions of the old Code relating to the unauthorized practice of law are substantively identical in all relevant respects to those contained in the new Illinois Rules of Professional Conduct (Petition pp. 44(b), 45(b)).[9] Consequently, the drafting and proposal of the new rules could not themselves have been a new source of any anticompetitive injury to petitioners.

Finally, because the only source of the restraints on petitioners' conduct is the Illinois Code, the Northern District Rules and their enforcement by the government, and not any alleged conduct of the CBA, none of the CBA's acts could have caused any injury to petitioners after 1982, when the Northern District adopted General Rule 3.54. Therefore, the complaint is time-barred regardless of any ongoing conspiracy. Accordingly, the District Court's holding that petitioners' antitrust allegations were time-barred (which the Seventh Circuit implicitly, though not expressly, affirmed) is not inconsistent with any decision of this Court and serves as an independent basis to deny the Petition.

[9]Petitioners' statement that services such as Lawline "were not prohibited by the Illinois Code of 1980" or the District Court rules adopted in 1982 is wrong (Petition p. 19). There is no discernible difference in the old and new provisions.

D. The Seventh Circuit's Holding That Petitioners' Constitutional Claims Against The CBA Were Properly Dismissed Because Petitioners Have Failed To Allege State Action Under §1983 Was Correct Under This Court's Decisions.

Relying on this Court's decision in *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 194 (1988), the Seventh Circuit properly affirmed the dismissal of petitioners' claims against the CBA under Section 1983 of the Civil Rights Act of 1871 on the grounds that petitioners had not established that the CBA acted under color of state law. The Court of Appeals rested its decision on the conclusion that:

> [T]he power to prescribe rules governing attorney conduct and to discipline attorneys for violating those rules, rests solely in [the Illinois Supreme Court].

Petition p. 35a (brackets in original) (citation omitted).

Petitioners' constitutional claims against the CBA allege only that the CBA: (1) participated in promulgating the ABA Model Code and Model Rules; (2) issued ethics opinions interpreting the Illinois Code; (3) investigated petitioners' suspected unauthorized practice of law; and (4) considered and commented on the Illinois Code. The glaring deficiency in plaintiffs' Section 1983 allegations is that they fail to allege that the CBA carried a "badge of authority of the state" and represented the state in some capacity. *Tarkanian,* 488 U.S. at 191; *see also Rendell-Baker v. Kohn,* 457 U.S. 830 (1982).

Petitioners have not alleged and cannot in good faith allege that the CBA carried any such badge of authority or otherwise represented the state by its limited involvement in the process which led the Illinois Supreme Court to adopt the model standards. Nor have petitioners alleged that the CBA wore a badge of state authority when it issued ethics opinions. Instead, petitioners argue that the CBA engaged in joint action with state officials

in allegedly drafting the "New Illinois Code" (Petition p. 21) (presumably referring to the 1990 Illinois Rules of Professional Conduct included at Petition, p. 44(b)).

Petitioners' argument ignores the point made in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), *reh. denied,* 434 U.S. 881 (1977), and reiterated in *Tarkanian,* that a private organization does not act under color of state law when it promulgates standards that are subsequently adopted by the state. In *Tarkanian,* the court considered whether the N.C.A.A. acted under color of state law when, with threats of sanctions, it prompted the University of Nevada to remove Jerry Tarkanian from UNLV's basketball program. As a member of the N.C.A.A., UNLV had agreed to abide by its rules and regulations, causing Tarkanian to argue that the school had thereby delegated its functions to the N.C.A.A. and clothed it with state authority. *Tarkanian,* 488 U.S. at 192. The Court disagreed, finding no state action by the N.C.A.A., because it was the State, not the N.C.A.A., that had suspended Tarkanian. *Id.* at 193-195.

Here, as in *Tarkanian,* the final act which allegedly harmed petitioners was committed by the state actor alone. It was the Illinois Supreme Court's decision to adopt as law the Illinois Code of Professional Responsibility that allegedly affected the petitioners' rights. As the *Tarkanian* Court noted in construing *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), which also involved adoption and enforcement of the ABA code, "[i]t does not follow, however, that the ABA's formulation of those disciplinary rules was state action. The state supreme court retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own." *Tarkanian,* 488 U.S. at 194. Thus the Illinois Supreme Court's decision to adopt the model standards does not support the conclusion that the defendant bar associations, and particularly the CBA, were acting under color of law when they lobbied for adoption of those standards. *See Tarkanian,* 488 U.S. at 195; *Bates,* 433 U.S. at 361-62.

Similarly, any alleged "joint activity" between the Illinois Supreme Court's Committee on Professional Responsibility and the CBA in drafting the 1990 Illinois Rules "prior to [their] submission to the Illinois Supreme Court" (Petition p. 21) is insufficient to constitute state action, for the same reason. The Illinois Supreme Court had the ultimate and sole authority to accept or reject the draft presented by the alleged "joint actors."[10]

Petitioners attempt to avoid the clear application of *Tarkanian* by arguing that the Illinois Supreme Court established a "procedural scheme" for drafting the proposed 1990 Illinois Rules which "provided no safeguards against misuse by private parties" and which the private associations "misused" to intrude on petitioners' rights, thus creating state action (petition at 21-22). This argument is an untenable effort to distract from the central focus in *Tarkanian*. The issue is not whether the CBA participated in the process, but who made the decision that affected petitioners. Here, that decision was the Illinois Supreme Court's adoption of the Illinois Code.[11]

Moreover, although petitioners argue here that the CBA "misused" the Illinois Supreme Court's "procedural scheme," the complaint contains no factual allegations supporting that argument. Further, they have cited no authority that supports the application of "procedural scheme" analysis here. *U.S. v. Classic,*

[10]Moreover, the proposed new Illinois Rules could not have caused petitioners harm in any event because they were not adopted until 1990, after the occurrence of the events alleged in the Complaint. Further, they are substantively indistinguishable in all relevant respects from the 1980 Illinois Code (see Petition pp. 44b, 44c).

[11]Again, any alleged activity relating to the drafting and adoption of the 1990 rules is irrelevant because the unauthorized practice of law provisions in the proposed 1990 Illinois Rules are substantively identical in all relevant respects to those contained in the old Illinois Code which was already in effect (see Petition pp. 44b, 44c). Consequently, the 1990 Rules and the CBA's alleged participation in drafting them cannot have caused whatever injury petitioners suffered (see previous footnote).

313 U.S. 299 (1941) (petition p. 22) involved the indictment of state election commissioners who were given authority by state statute to count ballots. Their willful alteration and miscounting of the ballots was found to be a misuse of the power given them by the state. Here, by contrast, petitioners have alleged no facts showing that the state conferred any similar authority on the CBA or that the CBA engaged in any such misconduct.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (petition p. 22), a state statute that gave creditors the right to attach a debtor's property through the court without due process was found to create state action when the creditor on his own put the state process in motion. Here, petitioners have failed to allege the existence of any such law. Thus, neither *Lugar* nor *Classic* supports petitioners' theory of state action.

The allegations contained in the First Amended Complaint, by which petitioners are bound, are insufficient to allege the essential and threshold element of state action needed to make the CBA liable for petitioners' alleged deprivations of constitutional rights. Furthermore, none of petitioners' cases support the theory that lobbying alone can be state action or that the CBA engaged in joint activity or a "procedural scheme" that could convert their activities into state action. The Seventh Circuit's finding of no state action was entirely consistent with this Court's ruling in *Tarkanian*.

CONCLUSION

The Petition should be denied on both procedural and substantive grounds. Procedurally, petitioners failed to comply with Rule 33.7, making the Petition untimely. Further, the case is moot because petitioners suffered no actual injury and the respondents have stipulated they have no intention of prosecuting any disciplinary charges against petitioners in the future.

Substantively, the Seventh Circuit correctly discerned the critical omissions in petitioners' complaint. Petitioners' antitrust claims stated no cause of action against the CBA because the CBA's actions are immune under *Noerr*. Independently, petitioners' complaint alleges no injury to competition, and petitioners' antitrust claims are also time-barred. Petitioners have failed to demonstrate how the Seventh Circuit's ruling on petitioners' antitrust claims conflicts with any decision of this Court.

The Seventh Circuit was also correct under this Court's decision in *Tarkanian* when it affirmed the District Court's dismissal of petitioners' constitutional claim for lack of state action. The state was free to adopt or reject the Model Code and Model Rules as it saw fit. Because the state's choice to enact into law and enforce those standards was the final act that allegedly harmed petitioners, the CBA's activities were not state action.

The Petition establishes no grounds meriting further review by this Court. The courts below did not misapprehend any controlling legal standard. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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